



Disclosure Caselaw Update

OR: FIRE PREVENTION AND REMEDIATION

Objectives

- ▶ 1. Understand the law surrounding disclosures according to the Michael Morton Act, *Brady*, and ethics rules
- ▶ 2. Learn what to do in trial or on appeal when something was not properly disclosed



It's not about bad actors...



MIKE NIFONG
DUKE LACROSSE PROSECUTOR

It's about getting it right

- ▶ You'll find disclosable information in unexpected places
- ▶ You need to know what you're looking for
- ▶ You need to know where to look...
- ▶ And what to do when it goes wrong

Sources of a Prosecutor's Duty to Disclose

- ▶ 1. *Brady* (due process, US Constitution)
- ▶ 2. Ethics Rule 3.09(d)
- ▶ 3. The Michael Morton Act: Code of Criminal Procedure 39.14
- ▶ 4. Other Sources



Brady & Its Progeny

Due process is violated when the prosecutor
(*regardless of good or bad faith*)

- ▶ Fails to disclose evidence (*no request needed*)
- ▶ In possession of agents of the State
- ▶ Favorable to the defendant
 - ▶ Exculpating, impeaching, mitigating
- ▶ Material to either guilt or punishment

Brady

- ▶ Brady & Boblit robbed and killed a man for his car
- ▶ Boblit's statement that HE strangled the victim was not turned over



What to Look For

- ▶ The “oh crap” standard?



Frequent Sources of Exculpatory Information (*Brady* or 39.14(h))

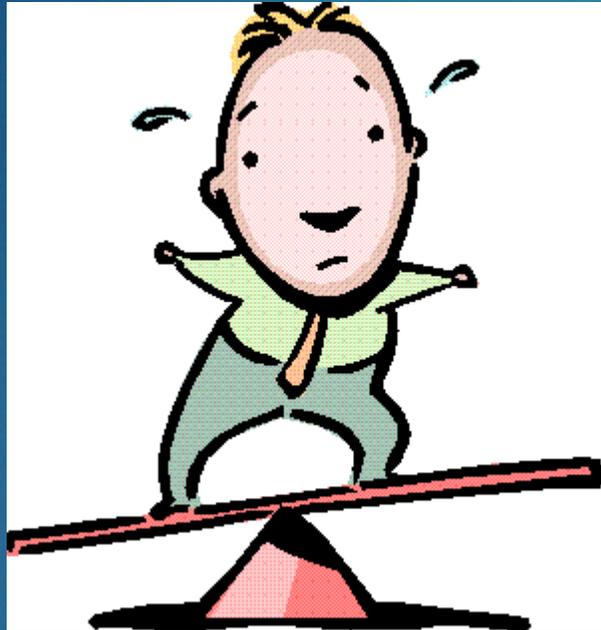
- ▶ Relative culpability among participants. *Brady*.
- ▶ Victim's criminal history supports self-defense claim. *Agurs*.
- ▶ Deal of leniency with co-defendant. *Giglio*, 405 U.S. at 151.
- ▶ Deal of leniency by police to paid CI. *Banks v. Dretke*, 540 U.S. 668 (2004).
- ▶ Other potential suspects. *Ex parte Miles*, 359 S.W.3d 647.
- ▶ Ask yourself: Did the witness receive some sort of benefit?

Michael Morton Act



State's initial view

Evolving view of Morton?



before Morton



after Morton

Fire Prevention: Follow the MMA

- ▶ Before trial, just follow the MMA.
 - ▶ This will cover your duty to disclose both *inculpatory (a)* and *exculpatory (h)* items
- ▶ Follow the MMA after trial as well
 - ▶ You have a continuing duty to disclose exculpatory information **even after trial (k)**



All Your Cards on the Table



MMA Applies To

- ▶ Cases after 1-1-14
- ▶ Guilt & Punishment (*Watkins*—Waco COA)
- ▶ Offense reports, documents, papers, written or recorded statements of defendant or witness (except work product)
- ▶ Material to any matter involved
- ▶ In possession of State or her contractor

Materiality Practice Tip

- ▶ Pre-trial, just ask whether this is “evidence material to any matter involved in the action” and in possession, custody, or control of the state.
- ▶ Don't consider whether:
 - ▶ Exculpatory
 - ▶ Inculpatory
 - ▶ Might change the outcome

Materiality

- ▶ Don't guess whether a judge in a far-off place and time will agree with you
- ▶ *Whitney* story
 - ▶ Inculpatory vs exculpatory
 - ▶ Radar wasn't up
 - ▶ Bad position to be in



“Even a conscientious prosecutor
will fail to appreciate the
significance of some items.”

-U.S. v. Agurs

Our
Requirement
to Disclose

≠

Admissible
Evidence



Privileges

Privileges

- ▶ Apply to 39.14(a) & part of Ethics Rule
 - ▶ **NOT BRADY** or 39.14(h) Exculpatory
- ▶ Most Privileges must be invoked by someone else
- ▶ Many do not operate in criminal cases
- ▶ Some prevent admissibility not disclosure
- ▶ Burden on Party Who Asserts Privilege

Other People's Privileges

- ▶ Spousal / Clergy / Attorney-Client

- ▶ waived by voluntary disclosure (TRE 511)

**Inform
before
disclosing**

- ▶ Mental Health Records
Health & Safety § 611.002

- ▶ Journalists
CCP art. 38.11

- ▶ Crime Stopper
Gov't Code § 414.007et seq

Privileges With Broader Reach?

- ▶ Any person
 - ▶ who receives information from a confidential communication/record
 - ▶ may not disclose the information
-

Tex. Gov't Code § 420.075– offense to intentionally disclose communication made to Sexual Assault Advocate (except as provided)

Privileges With Broader Reach?

- ▶ **Sexual Assault Advocate**

Gov't Code § 420.071(c)

 new

- ▶ **Family-Violence Advocate**

Fam. Code § 93.001 et seq.

- ▶ **EMS Records**

Health & Safety Code § 773.091(c)

Clash of Duties



- ▶ Submit to Judge In Camera 39.14(c)
- ▶ Explain danger/privacy interest at stake
- ▶ Suggest how defense can acquire same info elsewhere



- ▶ Seal the Record

Privileges We Can Assert

- ▶ child porn & forensic interview
- ▶ CPS & CAC records
- ▶ Work-Product
- ▶ Confidential Informant

Exception to Privilege:

- ▶ When Privileged source contains **exculpatory information**

Example: Confidential Informant paid money

- ▶ Privilege doesn't exempt **Brady disclosure**.

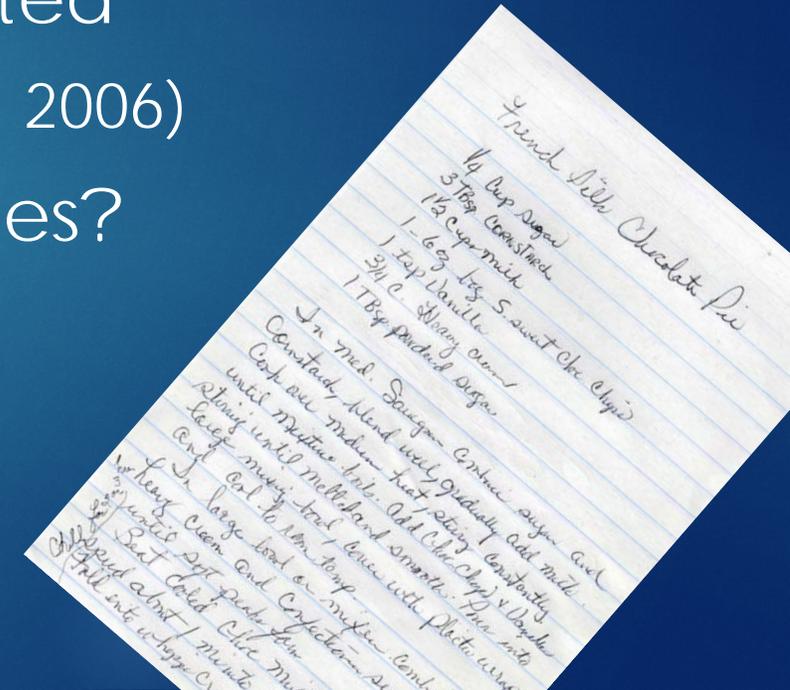
Ex parte Miles, 359 S.W.3d 647 (Tex. Crim. App. 2012)

Exception to Privilege: CPS Records

- ▶ *Pennsylvania v. Ritchie*, 480 U.S. 39, 59
 - ▶ CPS records to be disclosed to trial court *in camera*
- ▶ *Thomas v. State*, 837 S.W.2d 106, 113
 - ▶ Former absolute Crime Stoppers Privilege violated due process w/o *in camera* process

Are Your Notes Protected?

- ▶ Facts that exist independent of the attorney are not protected
- ▶ Statements about the *significance* of facts or *strategic conclusions* may well be protected
 - ▶ *Pope v. State*, 207 S.W.3d 352 (Tex. Crim. App. 2006)
- ▶ Are you turning over witness interview notes?



Your Notes, continued

- ▶ *Deamus*, 2017 WL 3599771
 - ▶ Murder
 - ▶ Through discovery, no witness saying they saw D with gun in hand
 - ▶ Witness only tells prosecutor he saw D shoot
 - ▶ Court agrees that “prosecutor’s notes are not a witness statement under Rule 615.”
 - ▶ Still violated discovery order
 - ▶ “*undisclosed* claim of work product”

Informer's Identity Privilege (TRE 508)

- ▶ Identity of CI is privileged if
 - ▶ 1) CI furnished info to ofc investigating crime and
 - ▶ 2) info relates to the investigation



Confidential Informant Identity

- ▶ TRE 508
- ▶ Except
 - ▶ State will call CI
 - ▶ testimony necessary to “fair determination of guilt/innocence”



CI Privilege

- ▶ Except:

- ▶ Rule for Suppression

- ▶ CI's info relied on to establish how police legally obtained evidence and
 - ▶ t/c doesn't believe that info was received from a CI reasonably believed to be credible



Limits on Disclosure: Pending Officer Misconduct Allegation

- ▶ *In Camera* review of officer's misconduct allegations (still pending)
- ▶ "it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge." *U.S. v. Agurs*, 96 S. Ct. 2392 (1976); *U.S. v. Bagley*, 105 S. Ct. 3375 (1985)

When in doubt...

- ▶ Turn over
- ▶ Punt to trial court
 - ▶ *Assert a privilege?*



When to take it to the court

- ▶ Privilege conflicts with MMA
- ▶ Pending officer misconduct allegation
- ▶ CI (508)
- ▶ Any other issues?



New in 2017: Snitches

- ▶ Jail-house Snitches
 - ▶ Applies to anyone who D makes statement against his interest to while jailed
 - ▶ Includes offers in other cases from other offices (tracking CCP art 2.023)

Easy Fire Prevention

- ▶ Is this information material to any matter involved in the action?
- ▶ And is it in the state's possession?
 - ▶ Then turn it over
- ▶ Is it privileged?
 - ▶ Assert the privilege



What to Do When a Fire Breaks Out



What to Do When a Fire Breaks Out



TDCAA's Annual Update

Disclosure Differences Under *Brady*, Ethics Rule, Morton

I. Backg

A. Source

There :
to the defen

- (1) co
- (2) pr
- (3) th
- M

Other auth
situations,
39.14(a) pu

	Brady	Ethics Rule 3.09(d)	39.14(a)	39.14(h)
Disclose even in absence of request by Defense?	Yes. <i>Agurs</i> , 427 U.S. 97, 107 (S.Ct. 1976).	Yes	No—but need not specially “designate”; generic request is enough (though motion without an order is not)	Yes
Violation Even if No intent to violate/ Lack of Bad Faith?	Yes	Yes	Yes—but sanction of evidence exclusion is less likely w/o intent to violate	Yes
Disclose even if Prosecutor doesn't think it's credible?	Yes	Yes	Yes	Yes
Kind of Evidence it applies to	Favorable: -exculpatory -impeaching -mitigating	Rule 3.04(a) Potential or actual evidentiary value 3.09(d) Tends to -negate guilt -mitigate offense -mitigate sentence	Anything, including inculpatory	-Exculpatory -Impeachment -Mitigating

In Case of *Brady*, ARGUE

- ▶ Disclosed in time to use it
- ▶ *Brady* doesn't apply to
 - ▶ Publicly available material
 - ▶ Evidence that didn't exist/State would have to create
- ▶ Evidence isn't material, even in cumulation

Brady

Have "Duty to Learn"

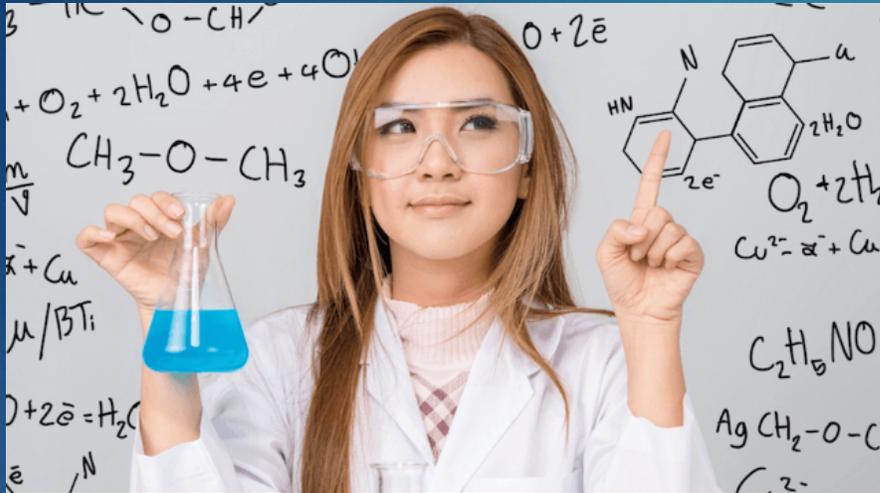


What They Know



But Not Them

Diamond—Analyst misconduct



- ▶ Certified report with wrong D's name
- ▶ Removed from casework
- ▶ Testified w/o disclosing

Held: Misconduct goes to expert qualification;
Material to BAC >0.15 finding

Brady & Guilty Pleas



Alvarez v. City of Brownsville,
No. 16-40772

___ F.3d ___, 2018 WL 4441619
(5th Cir. 9/18/18)

- Circuit split
- Duty to disclose **exculpatory** material despite guilty plea



Ethics Rule 3.09(d)

The prosecutor in a criminal case shall:

- ▶ Make **timely** disclosure to the defense
- ▶ All evidence or **information**
- ▶ Known to the prosecutor
- ▶ That tends to negate guilt or mitigates the offense
- ▶ And in sentencing, disclose all unprivileged mitigating information

Schultz v. Comm'n for Lawyer Discip.



- ▶ Maria was stabbed in room at night
- ▶ Told police it was her husband
- ▶ Told Schultz pretrial:
 - ▶ couldn't see his face
 - ▶ identified by his smell
sole of his boot, stature

Schultz

- ▶ No doubt Maria knew her husband
- ▶ Never occurred to Schultz that it was **Brady** material
- ▶ Mistrial at sentencing
- ▶ Grievance



Ethics Claim:

Should You Argue This ?

“It wasn’t material.”

No! Schultz

Ethics Claim:

Should You Argue This ?

“It was enough that the defense had it in time to use at trial.”

Probably not--3.09 requires “timely disclosure” (so defense can make meaningful use of it)

Ethics Claim:

Should You Argue This ?

“That exculpatory material was privileged work-product.”

No. Privilege applies only to mitigation of punishment.

Ethics Claim:

Should You Argue This?

“The information
wasn’t known to
me.”

Yes. Ethics requirements are personal to prosecutor.

Ethics Claim:

Should You Argue This?

“Rule 3.09 didn’t apply
to post-conviction
matters before the
Morton Act.”

Yes. Hanna.

Ethics Case:

Comm'n Lawyer Discipl. v Hanna



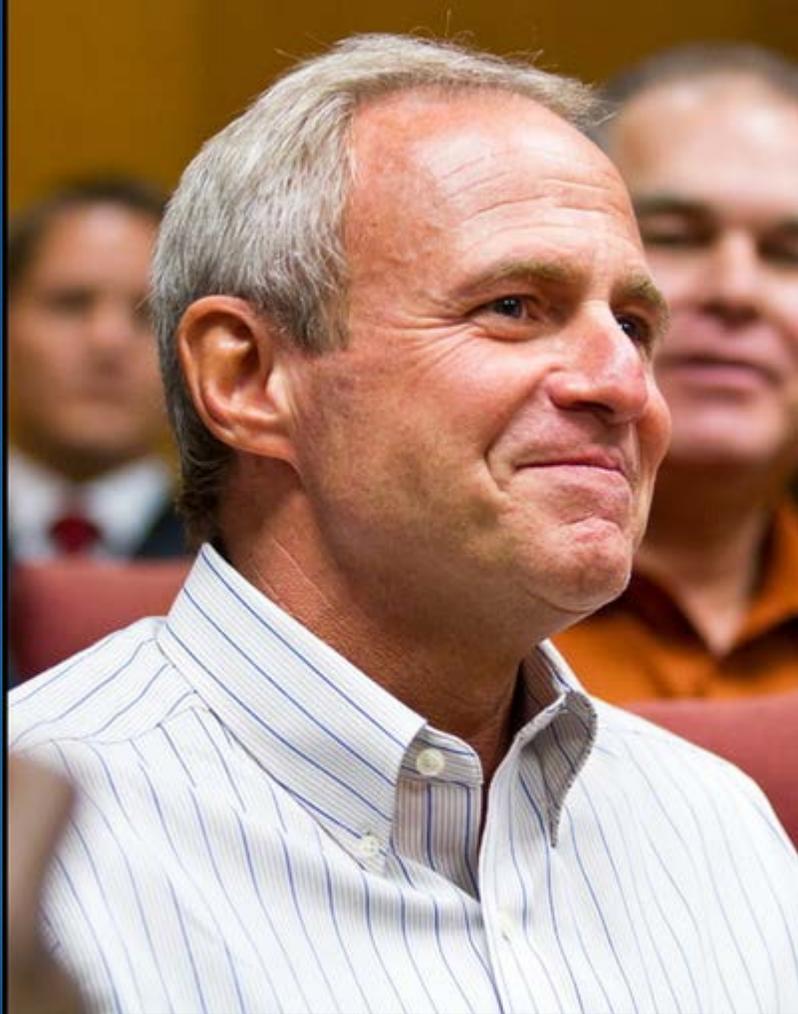
- ▶ Pre-Morton
- ▶ Rule 3.09(d) does not apply post-conviction
- ▶ Might apply now that we have Morton Act?

Ethics Rule 3.04(a)

- ▶ Lawyer shall not **unlawfully** obstruct
- ▶ Another party's access to evidence;
- ▶ Conceal a document/material
- ▶ That a competent lawyer would believe has potential/actual evidentiary value

BRADY/MORTON violation=Ethics Violation

What to Argue: MMA



- ▶ 39.14(a)
- ▶ 39.14(h)
- ▶ 39.14(k)

What to Argue: 39.14(h) Violation

- ▶ You SHOULD NOT argue materiality
- ▶ You SHOULD argue:
 - ▶ Not in state's possession or control
 - ▶ Not exculpatory, mitigating, or impeaching
 - ▶ Item was disclosed (discovery log, file folder, email)

What to Argue: 39.14(a)

No Request

- ▶ *Glover, Hinojosa*—39.14(a) is triggered “on request”
- ▶ *Majors*—*Un-ruled-on Motion isn't a “Request”*

Served State with Motion?

But not “Defense didn't designate this specific item”

- ▶ *Unless D's request is narrow*

What to Argue: 39.14(a)

▶ Defense Request was not “Timely”

Schard

- ▶ DWI accident
- ▶ midtrial request
- ▶ for documentation that D received medical clearance following DWI accident

Ruled: untimely



What to Argue: 39.14(a)

▶ Defense Request was not “Timely”

Possible Argument:

“Discovery” = prelim matter; forfeited if not raised at scheduled pretrial hearing under art. 28.01

**Remember: Plan A is DISCLOSURE
This is Plan B**

What to Argue: 39.14(a)

- ▶ Disclosure was “As Soon As Practicable”

Art. 39.14 doesn't apply pre-indictment

- ▶ *Ex rel. Munk* (district court lacks jurisdiction)
- ▶ *In re Lewis & In re Carrillo* (2015 CCA unpub) (Alcala concurring)

Art. 39.14 : “defendant,” “case,” or “action”

What to Argue: 39.14(a)



Materiality

- ▶ *Branum, Carrera, Watkins (relying on CCA in Ehrke)* apply *Brady* standard of materiality
reasonable probability of different outcome
- ▶ Another Interpretation

Materiality Analysis?

- ▶ ...the state shall produce . . . offense reports, . . . or other tangible things. . . that . . . contain evidence **material to any matter involved in the action**
- ▶ Material ~ **relevant** to the case

What to Argue: 39.14(a)

“To Any Matter Involved in the Action” Includes :



The trial's final outcome

a witness's credibility

question RE:
witness's credibility

What to Argue: 39.14(a)

- ▶ **Not in State's (or contractor's) possession or control**

In re Stormer (CCA pre-Morton)

- ▶ *"Art. 39.14 deals with production of discovery materials, not their creation"*
- ▶ No duty to investigate
- ▶ But still may have to produce witness/exhibit lists

What Else to Argue in Trial Court

- ▶ Work Product – “Core Work Product”

In re State ex rel. Skurka

DISCLOSE which of 1000+ calls will offer

- ▶ In camera
- ▶ Explain how disclosure will reveal strategy/thoughts

Remedy

- ▶ **Exclusion wasn't Warranted**
 - ▶ Show **Not willful** (treat like speedy trial hearing)
 - ▶ **Willfulness is not enough when trial is months away?** *Tarin*
 - ▶ **Agree to recess, continuance**
- ▶ *Flip-Side* : Due process may sometimes require exclusion even w/o willful violation

What to Argue on Appeal

- ▶ **Defense failed to object**

- ▶ 39.14(a), (h), (j)—all subject to forfeiture on appeal

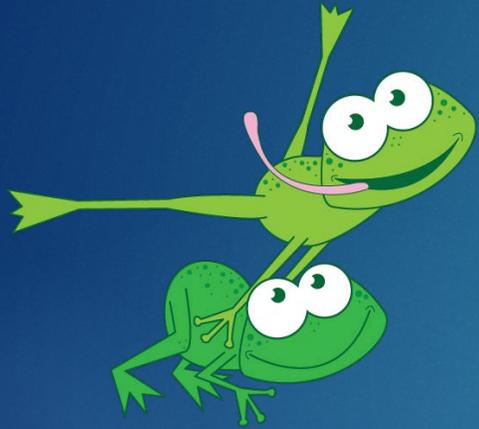
- ▶ *Glover, Prince, Rodriguez*

- ▶ **Defense failed to ask for a continuance**

- ▶ If truly surprised, you'd ask for more time

- ▶ *Branum, Prince*

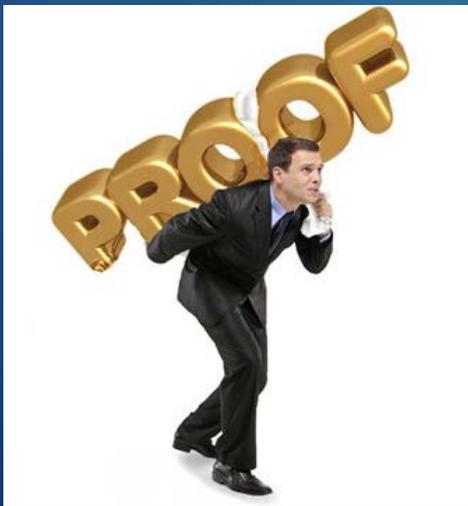
What to Argue on Appeal



- ▶ Defense request for mistrial was not least remedy

- ▶ *Young*, 137 S.W.3d 65 (CCA 2004)

- ▶ Must ask for recess, continuance if these would cure



- ▶ CCP 39.14(h): Defense burden to show information was favorable

Pursuing Mandamus

- ▶ 1st prong satisfied (*No adequate remedy at law*)
Powell v. Hocker

- ▶ 2nd prong (clearly entitled to relief)

t/c order attempts to override express provisions of 39.14

- ▶ *Powell* (no copies to client)
- ▶ *In re State* (El Paso) (no copy of forensic interview); *But see In re State ex rel. Tharp* (reporter's transcript of forensic)

Start w/
COA

Inmate Phone Calls/Mail

A.G. Opinion KP-0041

Duty to Produce?
Even if we haven't
accessed/read?



Pending Employment Case



Hillman v. Nueces Co & DA's Office

No. 17-0588

Allegation: ADA fired for refusing to withhold exculpatory evidence

Exception to sovereign immunity?

“[T]he vast majority of citizens . . .
know nothing about a particular case,
but [they] give over to the prosecutor
the authority to seek a just result
in *their* name.”

✓ Get the right person the right way

✓ Protect your case and yourself

→ You Won't Get Burned

